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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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November 16, 1998

BY HAND

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: Petition for Reconsideration  
FM Table of Allotments  
Allegan and Otsego, Michigan

Dear Ms. Salas:

Enclosed on behalf of Forum Communications, Inc. ("Forum"), licensee of WZUU(FM), Channel 221A, Allegan, Michigan and WQXC(FM), Channel 265A, Otsego, Michigan are an original and four copies of a petition for reconsideration of an October 15, 1998 decision by the Allocations Branch of the Policy and Rules Division of the Mass Media Bureau to return as "unacceptable for rulemaking at this time" Forum's petition for rulemaking filed with the Commission on June 10, 1998.

We have included one additional copy of the petition and we would appreciate it if you would date-stamp that copy and return it to us for our files. If any questions should arise regarding this petition, please contact me.

Sincerely,

*Timothy J. Fitzgibbon*

Timothy J. Fitzgibbon TFB  
Counsel for Forum Communications, Inc.

TJF:tfb  
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**Before the  
Federal Communications Commission  
Washington, D.C.**

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. _____
Table of Allotments,	)	RM- _____
FM Broadcast Stations,	)	
(Allegan and Otsego, Michigan)	)	

To: Chief, Allocations Branch

**PETITION FOR RECONSIDERATION**

Forum Communications, Inc. ("Forum"), pursuant to Sections 1.104 and 1.106 of the Commission's Rules, hereby petitions for reconsideration of the October 15, 1998 decision by the Allocations Branch of the Policy and Rules Decision of the Mass Media Bureau (the "October 15 Letter Ruling") to return as "unacceptable for rulemaking at this time" Forum's petition for rulemaking to amend the FM Table of Allotments by substituting Channel 222A for Channel 265A at Otsego, Michigan and Channel 265A for Channel 222A at Allegan, Michigan. The Commission should reconsider its October 15 letter Ruling because Forum's proposal: (a) is consistent with Commission precedent applicable to grandfathered stations; (b) will eliminate existing short-spacing on Channel 222A and allow an increase to maximum Class A power for that facility; and (c) will not affect the existing grandfathered short-spacing of Channel 265A at all and will not adversely affect any other allotment or station. Consequently, Forum respectfully requests that the Commission issue a Notice of Proposed Rulemaking with respect to its proposal, or in the alternative, keep Forum's Petition for Rulemaking on file pending resolution of the policy issues raised in several pending rulemakings.

### Preliminary Statement

Forum currently is the licensee of two Class A FM stations in Michigan which are short-spaced at their present locations. It is the licensee of WZUU(FM), which is licensed to operate on Channel 222A at Allegan, Michigan, where it is short-spaced with two stations operating on a first-adjacent channels.<sup>1</sup> Forum also is the licensee of WQXC(FM), which is licensed to operate on Channel 265A at Otsego, Michigan, where it is short-spaced to two first adjacent channels and one second adjacent channel.<sup>2</sup>

On June 10, 1998, Forum filed a Petition for Rulemaking proposing to switch the communities of license for the two stations and to relocate the transmitter for WZUU(FM). Forum's proposal would: (a) eliminate all existing short-spacing for WZUU, Channel 222A allowing that station to operate at full Class A facilities from Otsego; (b) leave the existing operation and short-spacing of WQXC, Channel 265A unchanged, except that Allegan would be its new community of license; and (c) have no adverse affects on any other facilities.

By letter dated October 15, 1998 ("October 15 Letter"), the Commission returned Forum's Petition for Rulemaking as "unacceptable for rulemaking at this time." Specifically, the October 15 Letter stated that although the proposed operation of Channel 222A at Otsego "complies with our rules provided the requested channel change is made at Allegan," the proposed operation of Channel 265A at Allegan "is short spaced to Station WITL, Channel 264B, Lansing, Michigan, and to Station WCUZ, Channel 267B, Grand Rapids, Michigan." Forum respectfully requests reconsideration of that decision because it is inconsistent with

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<sup>1</sup> WGHN(FM), Channel 221A at Grand Haven, Michigan and WVHQ, Channel 221A at Dowagiac, Michigan.

<sup>2</sup> WBYT(FM), Channel 264B, at Elkhart, Michigan; WITL(FM), Channel 264B, at Lansing, Michigan; and WCUZ(FM), Channel 267B, at Grand Rapids, Michigan.

established precedent regarding changes in the community of license for grandfathered short-spaced FM facilities. In addition, the decision reflected in the October 15 letter essentially prefers to maintain two short-spaced allotments instead of only one, which appears to be inconsistent with the policy objectives underlying the Commission's FM Table of Allotments.

### Argument

#### I. Forum's Proposal Is Consistent With Applicable Commission Precedent

The October 15 Letter concluded that Forum's proposal to change the community of license for WZUU(FM), Channel 222A, from Allegan to Otsego "complies with our rules provided the requested channel change is made at Allegan, Michigan." However, the Commission apparently rejected Forum's "proposal for Allegan" (i.e. to change the community of license for WQXC(FM), Channel 265A, from Otsego to Allegan) because it would be "short spaced to Station WITL, Channel 264B, Lansing, Michigan, and to Station WCUZ, Channel 267B, Grand Rapids, Michigan," if the current spacing requirements of Section 73.207 are applied. Consequently, the Commission concluded that Forum's proposal "is unacceptable for rulemaking at this time."

First, the spacing requirements of Section 73.207 should not apply to Forum's proposal. The Commission repeatedly has stated that it will consider waiving the requirements of Section 73.207 to permit changes in grandfathered short-spaced stations "provided that no new short-spacings are created, no existing short-spacings are exacerbated, and the potential for interference between currently short-spaced stations is not increased." See, e.g. Newnan and Peachtree City, Georgia, 7 FCC Rcd. 6307 (1992). That is exactly the case with Forum's proposal.

As set forth in the attached Engineering Statement, WQXC has operated from the same location with the same facilities since 1981. Using the spacing requirements in Section 73.207, it currently is short-spaced with WBYT, WITL and WCUZ and it will remain short-spaced with those stations regardless of whether it is allotted to Otsego (under the current FM Table) or to Allegan (under the Forum proposal). Thus, looking strictly at the portion of the Forum proposal concerning WQXC, it is no different from numerous other rulemaking proposals advanced by the Commission in which grandfathered short-spaced Class A stations have proposed to change their communities of license without making any other change in the operation of the station or in the short-spacing that existed under their present allotments. See, e.g. Newnan and Peachtree City, Georgia, 7 FCC Rcd. 6307 (1992); Berlin and North Conway, New Hampshire, MM Docket No. 97-216 (Notice of Proposed Rulemaking rel. Oct. 10, 1997); DeRuyter and Chittenango, New York, MM Docket No. 98-22 (Notice of Proposed Rulemaking rel. Feb. 27, 1998); Sugar Hill and Toccoa, Georgia, MM Docket No. 98-162 (Notice of Proposed Rulemaking rel. Sept. 11, 1998); Killeen and Cedar Park, Texas, MM Docket No. 98-176 (Notice of Proposed Rulemaking rel. Sept. 25, 1998); Fremont and Holton, Michigan, MM Docket No. 98-180 (Notice of Proposed Rulemaking rel. Oct. 2, 1998).

The Commission's rationale in each of these cases "was that 'grandfathered' FM stations were in compliance with our Rules when authorized and should be afforded the same opportunity to change their community of license as other stations authorized in conformity with our Rules." See, e.g., Fremont and Holton, Michigan, supra, at ¶4. The same is true of WQXC with respect to its existing short-spacings with WBYT, WITL and WCUZ. Consequently, Forum's proposal for WQXC should be treated like the rulemaking proposals in each of the cases cited above.

## II. Forum's Proposal Yields a Preferential Arrangement of Allotments

The Commission's role in considering proposals to amend the FM Table of Assignments is to "compare the existing allotment versus the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments" taking into consideration the "totality of factors" involved. See, e.g., East Brewton, Alabama and Navarre, Florida, MM Docket No. 97-233, DA98-2243, rel. Nov. 6, 1998 at ¶3. Forum's proposal clearly yields a more preferential arrangement of allotments than the current FM Table.

In Peachtree City, the Commission amended the FM Table, and in each of the other cases cited above, it released a Notice of proposed Rulemaking, even though it expressly recognized that the proposal would result in "removing one allotment from the FM Table of Allotments that does not comply with current spacing requirements and adding an allotment that does not comply with current spacing requirements at a new community." Forum's proposal does far better than that. It removes from the FM Table of Allotments two allotments that do not comply with current spacing requirements and replaces them with one allotment that fully complies with the current spacing requirements at a new community (Channel 222A at Otsego) and one allotment that does not comply (Channel 265A at Allegan), but does not create any short-spacing or interference different from that which already exists in the present allotment.

In each of the cases cited above, the Commission acknowledged that the proposed changes in community of license would result in the first aural transmission service for the proposed community. Likewise, Forum's proposal would ensure that the communities of Allegan and Otsego each retain one FM allotment and that Allegan retains its only local aural transmission service. Moreover, unlike any of the cases cited above, Forum's proposal would enable WZUU to operate with full Class A facilities at Otsego, eliminating a short-spaced allotment and resulting in a substantial increase in the area and population served by that facility.

Clearly, Forum's proposed reallocations result in a preferential arrangement of allocations considering the "totality of factors."

### III. The Commission Applied Inconsistent Spacing Requirements To Forum's Proposal

Among the reasons cited for returning Forum's Petition as "unacceptable for rulemaking at this time" was the Commission's conclusion that by operating on channel 265A at Allegan as proposed, WQXC would be "short-spaced to Station WITL, Channel 264B, Lansing, Michigan, and to Station WCUZ, Channel 267B, Grand Rapids, Michigan." However, the October 15 Letter made no mention of any short-spacing between WQXC and WBYT. Thus, the Commission apparently applied inconsistent spacing requirements to different aspects of Forum's proposal.

The Commission apparently used the spacing requirements of Section 73.213 to evaluate the separation between WQXC and WBYT. Section 73.213(c) states that stations "that become short-spaced on or after November 16, 1964...may be modified or relocated in accordance with paragraph (c)(i)...of this section." That provision appears to apply to WQXC because the station has operated from the same location using the same facilities since 1981. See, Engineering Statement, attached hereto as Exhibit 1. Any short-spacing which currently exists with respect to WQXC clearly arose "on or after November 16, 1964." Section 73.213 (c)(i) specifies that such a "grandfathered" short-spaced Class A station must maintain a minimum distance separation with a first adjacent Class B channel of at least 105 kilometers (as compared to the 113 kilometers specified in Section 73.207). The Commission apparently relied upon Section 73.213 to conclude that WQXC and WBYT would not be short-spaced because they are separated by 105.2 kilometers (see, Petition, Engineering Exhibit at Table 1).

However, the October 15 Letter concluded that WQXC would be “short-spaced to Station WITL” (Channel 264B at Lansing) despite the fact that it is separated from WITL by a slightly greater margin -- 105.8 kilometers (see Petition, Engineering Exhibit, at Table 1) -- than the separation from WBYT. Clearly, there is no short-spacing under the applicable provisions of Section 73.213 because the actual distance slightly exceeds the required distance of 105 kilometers. The Commission’s conclusions regarding WBYT and WITL could only be reached by applying one set of rules to the distance between WQXC and WBYT and another set of rules to the distance between WQXC and WITL. There is no reasonable basis for such inconsistent treatment.

With respect to WCUZ(FM), Section 73.213(c)(i) requires a minimum separation between Class A and second adjacent Class B facilities of at least 69 kilometers. The Engineering Exhibit included with Forum’s Petition indicates that the actual separation would be 68.1 kilometers.<sup>3</sup> The existing short-spacing with WCUZ “dates back over 17 years” and “any other site would cause new or worsened short-spacing.” See Petition, Engineering Exhibit at 2. As set forth above, the Commission has permitted changes in the community of license of a grandfathered short-spaced station, provided that “no new short-spacings are created, no existing short-spacings are exacerbated, and the potential for interference between the currently short-spaced stations is not increased,” which is exactly the case here. Moreover, the Commission previously has concluded that short-spacings of less than one mile (1.6 kilometers) are de minimis. See Kenter Broadcasting Co., 62 RR 2d 1573 (1986), aff’d sub nom. Kenter v. FCC, 62 RR2d 1579 (D.C. Cir. 1987).

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<sup>3</sup> WCUZ apparently filed an application to change sites in 1994, pursuant to a waiver of Section 73.213(c)(i), but the application has not been acted upon. If granted, the separation between WCUZ and WQXC would be reduced from 68.1 kilometers. However, the separation would be exactly the same regardless of whether WQXC is licensed to Otsego or Allegan.



### Conclusion

Forum's proposed rulemaking clearly would result in a preferential arrangement of FM allotments, eliminating all short-spacing with respect to one of the facilities involved and creating no additional or different short-spacing than exists today with respect to the other. In other cases where grandfathered short-spaced stations have proposed to change communities of license, the Commission has solicited public comment on whether the proposed change of communities would serve the public interest, notwithstanding the continuation of existing short-spacings. Forum respectfully suggests that its proposal deserves the same opportunity for public comment in the context of a rulemaking proceeding.

Respectfully submitted,

November 16, 1998

FORUM COMMUNICATIONS, INC.

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**ENGINEERING STATEMENT FOR FORUM COMMUNICATIONS, INC.  
WQXC, OTSEGO AND WZUU, ALLEGAN, MICHIGAN  
NOVEMBER 1998**

This engineering statement was prepared in support of Forum Communications, Inc.'s petition for reconsideration of the response to an FCC letter dated October 15, 1998 returning as "unacceptable for rule making at this time" Forum's proposed rulemaking petition to swap the communities of license for its WQXC, Otsego and WZUU, Allegan, Michigan.

WQXC is currently licensed to operate at Otsego, Michigan on allocated channel 265A, while WZUU is licensed to operate at Allegan, Michigan on allocated channel 222A. Forum's petition for rulemaking proposed to change the WQXC channel 265A community of license to Allegan, Michigan with no other changes, and to change the WZUU channel 222A community of license to Otsego, Michigan at a new allocation reference point. The FCC letter found no problem with the proposed allocation of channel 222A at Otsego, provided the proposed change at Allegan is made concurrently. The Commission's apparent objection to the proposed reallocation of channel 265A to Allegan is therefore addressed herein.

The Commission apparently objected to the proposed reallocation of channel 265A to Allegan because it would create a short-spaced allotment under the Commission's current separation requirements as reflected in 73.207 of the rules. However, the same short-spacings exist today under the current allotment of that channel to Otsego and would be unchanged by Forum's proposal to change the community of license to Allegan (except that Forum's proposal would free channel 222A from its short-spacing and allow that channel to be operated at full Class A facilities at Otsego). In short, Forum's petition would replace the two short-spaced allotments in the current FM Table with one fully spaced allotment and one in which the short-spacing is no different than it is today -- clearly a more preferential arrangement than

exists under the current FM Table. In short, there is no technical downside to the "channel swap" proposed by Forum.

The channel 265A allocation at issue dates back to at least 1981, and WQXC has operated on this channel from the specified site since April 1981 (BLH-810507AH). WQXC has remained at its current location with its current facilities for over 17 years and is not proposing to change that. The short-spacings which exist today (WCUZ-FM, WBYT and WITL): (a) would have existed then if today's minimum spacings had applied; and (b) will exist regardless of whether channel 265A is allotted to Otsego or Allegan. WCUZ-FM's licensed facility (BLH-5400) was at 68.1 kilometers, WBYT (then WYEZ) was at 105.2 kilometers (BLH-7462) and WITL was at essentially the same site (one second latitude and six seconds longitude difference) at 105.6 kilometers.

All three of these short-spacings were addressed in the petition. WQXC fully complies with 47 CFR 73.213 to WBYT and WITL. The short-spacings arise only through the application of the current 73.207 spacing requirements. The 0.9 kilometer WCUZ-FM short-spacing has always existed, but potentially was worsened when the Commission granted a construction permit to WCUZ-FM (BPH-890623ID) after the October 2, 1989 effective date of the current spacing table, further reducing the distance to 62.6 kilometers, a full 6.4 kilometers short. That permit appears to have expired January 12, 1997 but is still listed in the FCC engineering database. A pending WCUZ-FM application is attempting to chip away another 0.8 kilometers (BMPH-940720IB), leaving only 61.8 kilometers spacing. Ironically, should WQXC lose its transmitter site, it could not meet the requirements of 47 CFR 73.213(c)(1) and still cover its current community of license (Otsego), due to the changes at WCUZ-FM.

Given the clear public interest benefits of eliminating the existing short-spacings with WGHN-FM and WVHQ on channel 222A, the current Allegan channel, by moving it to Otsego, there is no reason to deny a community of license change for channel 265A which will have no impact on the short-spaced stations. In fact, the Commission has allowed such reallocations under similar circumstances where there would be no change in the existing short-spacing of a grandfathered facility.

This engineering statement was prepared by me and is true and correct to the best of my knowledge and belief.

November 12, 1998



Mark A. Mueller